IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ARBITRATION ACT NO.6 OF 2002

Dempo Engineering Services
V.S. Dempo & Co. Pvt. Ltd.,
Campal, Panaji, Goa. ..... Appellants.

V e r s u s

Union of India,
Represented by the Chief Engineer,
Chennai Zone, Island Grounds,
Chennai – 09. ..... Respondents.

Mr. Sudin Usgaonkar, Advocate for the Appellants.

Mr. E.P. Badrinarayan, Advocate for the Respondents.

CORAM: DR. S. RADHAKRISHNAN, J

DATE: 15th September, 2006.

ORDER

1. By this appeal the appellant original claimant is challenging the Judgment and Order passed by learned Civil Judge, Senior Division, Panaji dated 20.4.2002 whereby the learned Judge had set aside the

Arbitrator's Award with regard to Claim no.1, Claim no.4 and Claim no.9.

2. The learned Counsel Mr. Usgaonkar appearing on behalf of the appellant pointed out that as per the original contract there was no provision for a water tank with a partition. Mr. Usgaonkar sought to rely on the letter of the Garrison Engineer dated 3.1.1991 to contend that there was no partition walls in any of the drawings. Therefore the submission is that when the appellant was directed to provide additionally the said partition wall, the respondent ought to have paid for the cost of extra expenditure towards the same.

3. The learned Counsel Mr. Usgaonkar therefore submitted that the learned Civil Judge Senior Judge had erroneously rejected the aforesaid claims on the ground that they were non arbitrable as per clause 7 of the contract. Mr. Usgaonkar also contended that clause 11(c) of the Contract should not have been resorted to for rejecting the claim of the appellant/claimant.

4. Mr. Usgaonkar contended that the said clause 11(c) is opposed to public policy and contrary to the provisions of Section 73 of Indian Contract Act. Under the aforesaid circumstances, he submitted that the learned Civil Judge, Senior Division had committed a patent error in setting aside the Award of the learned Arbitrator with regard to Claims

no.1, 4 and 9. Hence he prayed that the Order of the learned Civil Judge, Senior Division ought to be set aside and Award in terms of Claim no.1, 4 and 9 should be made Rule of the Court.

5. The learned Counsel Mr. Badrinarayan appearing on behalf of the respondent, Union of India strongly supported the Order of the learned Civil Judge, Senior Division of setting aside the Award with regard to Claim no.1, 4 and 9.

6. Mr. Badrinarayan the learned Counsel appearing on behalf of the respondent Union of India, strongly relied on clause 7 which forms part of the contract which reads as under :-

> "7. Deviations (Applicable Specifically to Measurement and Lump Sum Contracts and generally to Term Contracts) - The Contractor shall not make any alteration in, addition to or omission from the Works as described in the tender documents except in pursuance of the written instructions of the G.E.
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> No work that radically changes the original nature and scope of the Contract shall be ordered as a Deviation and in the event of disagreement between the Contractor and the Accepting Officer, the decision, of

the next higher authority (or of the Chief Engineer in case of contracts accepted by him) shall be final and binding on the Contractor."

7. Mr. Badrinarayan submits that except with the written consent of Garrison Engineer, the appellant could not have carried out any changes. In the event of a dispute, the decision of the Chief Engineer shall be final and binding on the contractor. In the instant case Mr. Badrinarayan pointed out that the Trial Court has rightly considered the letter of the Chief Engineer dated 1.8.1990 intimating that the contract includes the provisions of water tank with partition and hence no deviation Order was involved. In view of the same, Mr. Badrinarayan contended that as per clause 7, it falls in "excepted matters" and as such the learned Arbitrator while arbitrating on the same had travelled beyond the terms of the contract and exceeded its jurisdiction.

8. Similarly, with regard to Claim no.4 being extra expenditure incurred on overheads of establishment, watch & ward and other supervisory staff due to prolongation of contract at the rate of Rs.48,000/- per month for a period of 19 months, also followed "excepted matters" and Mr. Badrinarayan, in that behalf strongly relied on clause 11C of the general conditions of contract which reads as under :-

> "(C) No Claim in respect of compensation or otherwise, howsoever arising as a result of extensions granted under Conditions (A) and (B) above shall be admitted."

The aforesaid clause clearly prohibits any entertainment of any claim for prolongation of Contract. Therefore Mr. Badrinarayan submits in view of the aforesaid clause 11C that the learned Arbitrator committed a misconduct by exceeding and acted contrary on the terms of the contract. Hence he submitted that the Civil Judge, Senior Division had rightly set aside the Award with regard to Claim no.4. As far as Claim no.9 is concerned, Mr. Badrinarayan submits that as Claims no.1, and 4 are not sustainable, Claim no.9 would not arise. Mr. Badrinarayan strongly relied in Judgment of the Supreme Court in ***Thawardas Pherumal and another v. Union of India, AIR 1955 SC 468*** wherein the Hon'ble Supreme Court in paragraph 8 has clearly held that if the contractor agrees to an express term of the contract, then the contractor is tied down to the same. Paragraph 8 reads as under :-

> "We are clear that the arbitrator went wrong in law. Government departments have their difficulties no less than contractors. There is trouble with labour, there is the likelihood of machinery breaking down in

> out of the way places and so forth; there was also the danger of thunder storms and heavy showers of rain in the month of May: it will be remembered that the last date of delivery was 25.5.46.
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> If, with that in view, Government expressly stipulated, and the contractor expressly agreed, that Government was not to be liable for any loss occasioned by a consequence as remote as this, then that is an express term of the contract and the contractor must be tied down to it. If he chose to contract in absolute terms that was his affair."

9. Similarly Mr. Badrinarayan also referred to another Division Bench Judgment of the Delhi High Court in ***Delhi Development Authority v. Jagan Nath Ashok Kumar, 2000 (Suppl.)Arb. LR 281 (Delhi) (DB)***, wherein also in paragraph 8, the Delhi High Court has reiterated the concept "excepted matters" cannot be relied upon. Paragraph 8 reads as under :-

> "It is not in dispute that the counter Claim No.1 falls in 'excepted matter' i.e., as per the arbitration clause dispute regarding Claim No.1 was not referable. Such a matter therefore, normally, could not have been referred to Arbitrator and the position in this

> respect stands settled by catena of judgments of this Court following the dicta laid down by the apex Court [Refer: Vishwanath Sood vs. Union of India and Delhi Development Authority vs. M/s. Sudhir Brothers (supra)]."

Finally Mr. Badrinarayan relied on Judgment of the Supreme Court in ***Food Corporation of India v. Sreekanth Transport, (1999)4 SCC 491*** wherein paragraph 3 reads as under :-

> "3. "Excepted matter" obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator – concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the courts have been found out lacking in their jurisdiction to entertain an application for reference to arbitration as regards the disputes arising therefrom and it has been the consistent view that in the event of the claims arising within the ambit of excepted matters, the question of assumption of jurisdiction of any arbitrator either with or without the intervention of the

> court would not arise. The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters; what these exceptions are however are questions of fact and usually mentioned in the contract documents and form part of the agreement and as such there is no ambiguity in the matter of adjudication of these specialised matters and being termed in the agreement as the excepted matters."

Having heard both the learned Counsel and after perusing the Award as well as the terms of the general conditions of contract, specially clause 7, clause 10B, clause 11 and clause 70, it is very clear that the decision of the Chief Engineer would be binding on the contractor and the same could not have been arbitrated upon. Once a party concedes to a finality, thereafter the party cannot go back on the same. Therefore in view of the said clause 7 which deals with the "excepted matters" obviously the learned Arbitrator could not have arbitrated the same with regard to the claim of the partition. The learned Arbitrator had clearly travelled beyond the terms of the contract and had exceeded its jurisdiction as rightly held by Civil Judge Senior Division.

10. As far as Claim no.4 is concerned, clause 11C makes it

abundantly clear that once extensions are granted, there is no claim permissible. It is obvious that once a party agrees to such a term of contract, then the party cannot resile from the same and resort to Indian Contract Act. As far as Claim no.9 is concerned, namely award of interest, if Claim no.1 and 4 cannot be sustained, then there is no question of sustaining Claim no.9.

11. Under these circumstances, I do not find any error apparent on the face of the record or any illegality committed by the Civil Judge, Senior Division with regard to the aforesaid Claims no.1, 4 and 9. Appeal is totally devoid of merits and the same stands dismissed.

DR. S. RADHAKRISHNAN, J.

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